

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Uenuku Lincoln Fairhall

NZTDT 2018-9

The CAC has referred to the Disciplinary Tribunal (the Tribunal) a registered teacher, Uenuku Fairhall who breached professional boundaries during an international kura trip. This included sleeping in the same bed as a student while naked, sexualised talk, being partially clothed in front of students and entering a bathroom and washing the back of a student.

The result: The Tribunal cancelled his registration and censured him. Please note non-publication orders apply to this case.

The Tribunal's decision is dated from 12 November 2018 and is subject to an addendum decision released in June 2019. In addition, the Tribunal was asked to recall their decision in relation to name suppression but in June 2019 released a decision which stated they were not persuaded that there was any proper basis to recall their decision.

The conduct occurred during an international kura trip to Mexico in 2017. Mr Fairhall accepted that the incidents below occurred but disputed the context or extent of the incidents. The Tribunal found that Mr Fairhall:

- Slept in the same bed as Student 1 on multiple occasions and was naked on at least two of those occasions;
- Slept in the same bed as Student 4;
- Entered the bathroom area when it was being used by Student 2, told Student 2 to remove his underwear, and washed his back and swept Student 2's hands away from covering his bottom;
- Engaged in sexualised talk to a group of students; and
- Was partially clothed in front of students.

The Tribunal found insufficient evidence to support two other allegations in relation to the same trip.

The CAC submitted that Mr Fairhall's conduct met the test for serious misconduct and his inability to understand the need for, and maintain, professional boundaries with his students on the school trip reflects adversely on his fitness to be a teacher. The CAC argued that Mr Fairhall's conduct adversely effected the emotional wellbeing of all the students involved.

In relation to penalty the CAC submitted that cancellation of the respondent's practising certificate was necessary in this case to ensure public protection, deterrence and the maintenance of professional standards.

Mr Fairhall agreed with the submissions of the CAC but noted that his conduct should be viewed in light of his sleep deprivation.

The Tribunal described Mr Fairhall's behaviour as "despicable" and found that cancellation was the only appropriate penalty. They also imposed a censure and required Mr Fairhall to contribute to the CAC and Tribunal's costs.

Non-publication orders

The Tribunal made the following non-publication orders:



- The actual names of the students who are referred to in the Notice of Charge and Summary of Facts as Students (or S) 1, 2, 3, 4, 5, 7, 10, 11, 12, 13 are not to be published in connection with any specific allegation or fact contained in the charge, the Summary of Facts or this decision
- The names of any students referred to in letters provided on the subject of name suppression.
- The name of the parent who provided an affidavit in support of the kura's application to recall the decision.

The names of the students who went on the trip to Mexico are not suppressed. The actual names of the students who are referred to in the Notice of Charge and Summary of Facts as Students (or S) 1, 2, 3, 4, 5, 7, 10, 11, 12, 13 are not to be published in connection with any specific allegation or fact concerning the respondent's conduct contained in the charge, the Summary of Facts or this decision.

The Tribunal declined to make non-publication orders in relation to:

- The 21 students who went on the trip to Mexico
- The kura
- Mr Fairhall



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-9

IN THE MATTER of the Education Act 1989

AND

IN THE MATTER of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND

UENUKU LINCOLN FAIRHALL
Respondent

TRIBUNAL DECISION

DATED: 12 November 2018

HEARING: Held at Wellington 14 August 2018 on the papers

TRIBUNAL: Theo Baker (Chair)

Kiri Turketo and Nikki Parsons (members)

REPRESENTATION: Ms Elena Mok for the Complaints Assessment Committee

Ms Janette Andrews for respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers. The charge is that between 28 January 2017 and 30 March 2017, during an international kura trip, the respondent breached professional boundaries by:
 - (a) sleeping in the same bed as a student (Student 1) on multiple occasions and being naked on the majority of those occasions;
 - (b) sleeping in the same bed as another student (Student 4) on at least one occasion;
 - (c) entering the bathroom area on two occasions when it was being used by a student (Student 2) and telling the student to remove his underwear, and washing the student's back, and sweeping the student's hands away from covering his bottom;
 - (d) engaging in sexualised talk to a group of students;
 - (e) telling a student not to tell her mother when she had been inappropriately touched on her bottom by a stranger on the metro;
 - (f) being partially clothed in front of students;
 - (g) emotionally abusing a student, by telling her it was her fault that two teachers had left school.
2. The CAC alleged that the conduct was serious misconduct under s 378 of the Education Act 1989 and r 9(1)(c) and/or (o) of the Education Rules 2016, or alternatively it amounts to conduct otherwise entitling the Tribunal to exercise its powers.

Summary of decision

3. The Tribunal found there was insufficient evidence to support particulars 1(e) and (g).
4. We found that there was sufficient evidence to support particulars 1(a), (b), (c), (d) and (f). In summary, the respondent:
 - Slept in the same bed as Student 1 on multiple occasions and was naked on at least two of those occasions;
 - Slept in the same bed as Student 4;
 - Entered the bathroom area when it was being used by Student 2, told Student 2 to remove his underwear, and washed his back and swept Student 2's hands away from covering his bottom;
 - Engaged in sexualised talk to a group of students;

- Was partially clothed in front of students.

5. The Tribunal also found that each of these particulars amounts to serious misconduct. Our reasons are set out in paragraphs 43 to 68 of this decision. We found under s 378 of the Act that the respondent's conduct:

- adversely affected the well-being of some students and was likely to adversely affect the well-being or learning of one or more students;
- reflects adversely on the teacher's fitness to be a teacher; or
- brings the teaching profession into disrepute; and
- was of a character and severity that meets the criterion for mandatory reporting serious misconduct under r 9(1)(o) of the Education Council Rules 2016¹

6. We did not find that the conduct amounted to psychological abuse under r 9(1)(c).

7. We censured the respondent under s 404(1)(b) and cancelled his registration under s 404(1)(g). Our view of his conduct is further set out in paragraphs 74 and 75.

8. We have made orders for non-publication of the following under s 405(6)(c) as follows:

- a. the actual names of the students who are referred to in the Notice of Charge and Summary of Facts as Students (or S) 1, 2, 3, 4, 5, 7, 10, 11, 12, 13 are not to be published in connection with any specific allegation or fact contained in the charge, the Summary of Facts or this decision
- b. the names of any students referred to in letters provided on the subject of name suppression.

9. We declined suppression of the following names:

- a. the 21 students who went on the trip to Mexico
- b. the kura
- c. the respondent.

10. Therefore, the fact that a student went on the trip is not suppressed. The connection between a student and any of the facts contained in the allegations or established facts and charges must not be published. The reasons for the name suppressions decisions are found in paragraphs 92 to 105 of this decision.

¹ This is r 9(1)(o) before the Rules were amended on 19 May 2018 by r 6 of the Education Council Amendment Rules 2018

Evidence

11. The parties filed a comprehensive Agreed Summary of Facts. This is set out in full:

SUMMARY OF FACTS

Background

1. *The respondent, **UENUKU LINCOLN FAIRHALL** is a registered teacher. At the relevant time, the respondent was the *tumuaki* (principal) of *Te Kura Kaupapa Māori o Te Koutou*, a co-educational Maori immersion school in Rotorua, New Zealand (“the kura”). He had been in that role since 1998.*
2. *The kura offers education within a unique Māori environment for Māori students from Year 1 to Year 13.*
3. *Students from the kura learn Spanish, as well as Māori and English. Every three years a group of teachers and students from the kura travel to Mexico, for an extended study trip.*

Incidents between 28 January 2017 and 30 March 2017

4. *On 28 January 2017, a group of 21 students and three staff from the kura (including the respondent) departed for Mexico, via the United States of America.*
5. *The group were expected to spend 12 weeks away from New Zealand.*
6. *The format of the trip involved the students travelling around various parts of Mexico and staying in different accommodation. Due to the remoteness of the locations, the members of the group were not always able to contact home. In particular, the students only had sporadic access to communication with their parents.*
7. *On one occasion during the trip, when one of the female students, S5 was on the train in Mexico, she was inappropriately touched on her bottom by someone on the train.*
8. *S5 stated that, during a conversation with the respondent after the incident, she perceived that the respondent was telling S5 not to tell her parents about the incident on the train. S5 also stated that “[the respondent] made us feel really little”, and that the students had no phones, so she couldn’t talk to her parents for 10 days. In explanation, the respondent said that it was S5’s decision not to tell her parents about the incident on the train.*
9. *The students were not allowed to bring electronics, including phones, on the trip.*

10. Over the course of the trip, various incidents occurred which have given rise to the allegations. The six allegations are as follows:

Allegation 1 –

Sleeping in the same bed as Student 1 on multiple occasions and being naked on the majority of these occasions;

11. During the trip the students were separated into groups of six for accommodation purposes. The students in the respondent's group were S1, S2, S10, S4, and S11.
12. At most locations they were in accommodation with three double beds, which were shared by two people each. S1 was told by the respondent to sleep with him as he was the tallest.
13. The respondent stated that the reason for the shared accommodation was due to effective management of costs and security.
14. On the fourth night of the trip, the respondent took his pants off with his back to S1. He got into bed backwards, and was naked in bed.
15. The respondent stated that: "As I have gotten older I have more difficulty sleeping. This is exacerbated when managing a trip with all its vicissitudes [sic] and unforeseen circumstances. At home I don't wear pyjamas and find them too hot and restrictive. After two nights of very little sleep I was getting run down. I discreetly removed my underwear in bed so I could get to sleep. I had no idea that S1 was aware of this. I need to state that it was not for nefarious reasons it was just the need to sleep."
16. In the morning, the other students in the room teased S1 about sleeping in the bed with the respondent while he was naked. S1 said he felt depressed for the first time in his life and took himself off to be by himself.
17. The next day at breakfast, the respondent said, in front of other students, that S1 had put his leg over the top of the respondent's genitals (in his sleep) and that he had an erection at the time. The respondent described his erection as "morning wood ...saying this like it was a joke."
18. S1 understood he would not be expected to share with the respondent again, however, in the second hotel he was again expected to share a bed with the respondent on the first night. When S1 asked to change with another male student, his request was refused, and he again slept in the bed with the respondent, while the respondent was naked.
19. On the second night at the second hotel, S1 again asked if he could change beds and this time the respondent agreed and S4, aged 15 years, slept in the

bed with the respondent. Details of the incident involving S4 are outlined in allegation 2 below.

20. *On the third night, S1 again slept in the bed with the respondent but this time S1 said he would not share the bed if the respondent was naked. The respondent initially said he never slept with underwear on, and jokingly grabbed a pillow and put it in the middle of the bed between them. When S1 said he would not sleep in the bed in this way, the respondent got a towel and put it around him. S1 had to sleep in the bed with the respondent like this, and the respondent had nothing else on.*
21. *S1 continued to sleep in the same bed in this way with the respondent until the group left for Osaka City from which point S1 no longer had to share a bed with the respondent. When S1 was able to contact his mother, via a Facebook message, she was furious, however S1 was reluctant for her to tell anyone as he was embarrassed and did not want it to “get to this point” – meaning an investigation and interview by police.*
22. *On one occasion, S1 said he felt “the [respondent’s] bare bottom against him. This was the only time he felt the [respondent] touch him”.*
23. *On a trip to Veracruz, S1 again had to be paired up with the respondent but this time the respondent wore pants to bed. On their return from this trip, S1 was told by his mother that this would not happen again, however S1 continued to be in the same bed as the respondent until the last two nights of the trip when the respondent “ended up in his own bed”.*
24. *The respondent stated that, on the second night, S1 switched rooms with another student. S1 returned to the respondent’s room the following night and said he was uncomfortable sleeping in the same bed if the respondent was unclothed. The respondent said he found sleeping difficult with clothing but agreed with reluctance and slept the following night with a towel and thereafter in underwear.*
25. *The respondent stated:*
26. *“I fully realise now that it was foolish and inconsiderate to not wear clothing in the bed. But I never touched [S1] inappropriately and always tried to avoid his movements around the bed or shake him if I was awake so he would return to his side. When the instruction came from the Chairperson to ensure that teachers sleep in separate beds it was a relief for me and the other teachers and we were able to sleep much better.”*
27. *The respondent ensured that room arrangements were changed in line with the directive from Mrs Ruwhiu and the Board. The respondent noted this made the*

cost of accommodation and the supervision of students a bit more difficult, but he accepted that it was a more appropriate arrangement.

Allegation 2 – Sleeping in the same bed as Student 4 on at least one occasion

28. *The respondent slept in the same bed as S4, aged 15 years, on at least one occasion. The respondent answered the phone naked, and S4 and other students were beside the phone. The respondent was sharing a bed with S4 at the time.*
29. *S4 said he felt uncomfortable about the respondent being naked in the same bed as him.*
30. *The next morning S4 spoke to S1 about sharing a bed with the respondent and S1 described S4 as being shaken up. He said that the respondent had slept naked next to him and got out of bed and walked to the phone naked. S4 said other students in the room saw this. S4 said he felt down about this.*

Allegation 3 – In respect to Student 2:

- i. entering the bathroom area on two occasions when it was being used by Student 2; and*
- ii. telling Student 2 to remove his underwear, and washing Student 2's back; and*
- iii. sweeping Student 2's hands away from covering his bottom.*
31. *The respondent entered a bathroom area being used by S2, a 15-year-old male student, on two occasions. The respondent didn't get into the shower with S2, but opened the shower curtain to wash his back.*
32. *On the first occasion, in a hotel in Mexico City, S2 took his shirt off and the respondent said S2 had a tick on his back and told him he needed to have a shower and the respondent was going to wash it for him.*
33. *The respondent asked S2 to take his underwear off, so he did. S2 said he "felt funny weird". The respondent asked for the scrubber and started scrubbing his back. S2 covered his bottom and the respondent pushed S2's hands away from his bottom. S2 closed his eyes and waited for the respondent to finish scrubbing his back.*
34. *The respondent said "maybe we need to wash your back again tomorrow". S2 said he did not want to, and the respondent said, "it's because you can't reach your back." On this occasion the respondent was wearing shorts.*

35. *The next night the respondent washed S2's back again, and this time S2 told the respondent he could do it, but the respondent told S2 that S2 could not reach the middle of his back, so the respondent would do it. S2 was unwilling and described himself as "moaning" about this. S2 had his underwear on and this time when the respondent asked him to take them off he did not. When the respondent opened the shower curtain S2 still had his underwear on and the respondent told S2 to take them off again, S2 removed his underwear, then the respondent washed S2's back again. That night the respondent was only wearing underwear.*
36. *In explanation, the respondent stated that S2 developed a tick in a vein on his neck as well as a bright sore on and above his lip that looked that it could become a large cold sore, and he had become worried about pustules on his chest and his back.*
37. *The respondent stated he told S2 to go and have a shower and said he would scrub S2's back with a green scrubber he had brought with him. The respondent stated he told S2 to take off his underwear to wash himself completely as well as wash them, so they could be ready for the next day, and left the bathroom. The next night he again scrubbed S2's back as there still a few pustules.*
38. *The respondent described the bathroom amenities as being basic and with four of them sharing they had to shower and use the facilities quickly, particularly considering stomach issues becoming evident. He stressed the fact "that there was no inappropriate touching or ogling".*
39. *S2 said that "nobody else was spoken to about ticks on their backs and that he was "not aware of anyone else on previous trips having ticks".*

Allegation 4 – Engaging in sexualised talk to a group of students;

40. *The respondent engaged in sexualised talk to students.*
41. *S7 said that he heard the respondent say "I'd be a dirty bear in bed". S7 stated that: "[The respondent] was always telling dirty jokes. He would say 'I'd be a dirty bear in bed'. The girls were uncomfortable, but the boys just laughed. We were too scared to say anything coz [the respondent] is scary."*
42. *S13 said that he heard the respondent say: "...the boys should be careful because you'll be sleeping with a bear tonight." S13 stated that there were a lot of sexual jokes by the respondent.*

43. *The respondent said that a question had arisen about the accommodation groups being different for the upcoming week long excursion and that he had joked, asking who would want to be with 'un oso como yo' or 'a bear like me'. This, the respondent stated, was a reference to a comment someone had made when the group was swimming that the respondent looked like a teddy bear. The respondent observed that most people laughed, but that a couple of girls had looked "scandalously" at each other.*

44. *On another occasion, S1 said that: "We were on the train, on the Metro and he [the respondent] was giggling to himself and said that he was on the Metro with another student and the student was leaning on him and had fallen asleep and the student had a boner [erection] and the train was moving. He was telling it like it was a funny story."*

45. *The respondent asked S1 whether a previous student at the school was gay. When S1 said he wasn't, the respondent asked S1 not to tell anyone he had spoken about him.*

46. *After the respondent slept naked in bed with S1, S1 reported that: "The next day he was at breakfast [the respondent] told the other kids in front of [S1] that [S1] had been rolling about in the bed and that [S1] had put his leg over the top of [the respondent's] genital area. [The respondent] said that he had an erection at the time that [S1] put his leg on top of him. [S1] described [the respondent] as describing his erection as "morning wood". [The respondent] was saying this like it was a joke."*

Allegation 5 –

Being partially clothed in front of eight students, Students S1, S2, S3, S4, S5, S11, S12 and S13;

47. *Mr Fairhall was partially clothed or naked in front of S1, S2, S3, S4, S5, S11, S12 and S13.*

48. *S1 stated that "[the respondent] got a towel and put it around him and...had to sleep in the bed with him with the towel around him."*

49. *S2 stated the respondent was in "shorts, then undies."*

50. *S3 stated that he was "in there for the phone incident and [the respondent] had a towel on when he answered."*

51. *S4 stated: "I was in the room once when the phone rang, and everyone was asleep, and [the respondent] was naked and he went to answer the phone and me and my friends were beside the phone."*

52. S5 stated: "When we knocked on the door, [the respondent] would answer the door in his undies. I didn't know where to look."
53. S11 stated: "I was in his group on a trip and [the respondent] slept naked...We saw [the respondent] take his undies off under the covers in his bed."
54. S12 stated he went to his room to ask for his phone and he looked from behind the curtain and he thought the respondent was naked. All the other students were wearing underwear.
55. S13 stated that he saw the respondent when his torso was naked, and some of the boys were just in shorts. In explanation, the respondent stated: "At home I sleep unclothed and was finding it very hard to sleep in underwear in Mexico. I would take my underwear off at night to better sleep".

Allegation 6 –

Showing a lack of regard for Student 12's emotional wellbeing

56. The respondent showed a lack of regard for the emotional wellbeing of S12, a female student, during a conversation about why two teachers had left the school.
57. This behaviour occurred in the context of S12 using her cell phone while on the trip. S12 had her phone taken off her on the trip and she took it back from the respondent's bag. When the respondent discovered the phone three weeks later, he stated that it wasn't fair to the other students that they didn't get to have their phones. S12 said that the respondent stated that it was because of S12's problems that two teachers had left the school and S12 perceived that the respondent was blaming her for the teachers leaving the school. S12 stated that the reason why the respondent said this "...all started with the Waka Ama trophy. I got upset because I got a trophy for swimming, not my own sport. They gave their trophies to other people...I told the [respondent] and he told the other teachers they did it wrong. And he said that was why the teachers left."
58. In explanation, the respondent stated that, in discussing the phone, he pointed out to S12 that he always supported her as much as was possible, even if it cost him. He mentioned the tribulations that had arisen from the sports awards and how his decision had resulted in two staff members leaving. The respondent stated that, during the conversation, he did not say that S12 was to

blame for the teachers having left, clearly stating that it was his decision to take the action that he had.

Investigation

59. *On 23 February 2017 the Board Chair, Mrs Ruwhiu, was called by a parent to meet with them regarding a serious concern (allegation 3 – showering incident).*
60. *Mrs Ruwhiu sought advice, contacted the acting principal, informed the respondent of the concerns, and outlined the directives to be taken by him, including ensuring there was no sharing of beds with any staff.*
61. *Mrs Ruwhiu drafted a travel safety policy and procedures due to the nature of the concerns and provided the same to the respondent. The respondent confirmed the procedures were in place.*
62. *Mrs Ruwhiu discussed the concerns with two parents of boys affected. The parents confirmed that their sons wanted their concerns dealt with upon their return and did not want to be responsible for cancelling the trip.*
63. *The Board were advised of the concerns, and the proposal from Mrs Ruwhiu, that a further staff member be sent to assist. The respondent stated that the staff member was not required.*
64. *On 13 March 2017 the Board Chair, Mrs Ruwhiu, emailed the respondent in Mexico to inform him that a verbal complaint that had been received from two parents of students on the trip. The parents had requested reassurances that the students' safety was not at risk.*
65. *Due to the verbal complaint, Mrs Ruwhiu convened an urgent Board hui, and the steps outlined to date were disclosed to members of the Board. The Board resolved to inform the respondent that complaints relating to 'sharing a bed with a student,' 'sleeping naked' and 'no privacy in bathing' had been received; the respondent was to reaffirm that absolutely no staff are to share beds with any students; all students are to be respected and allowed to bathe in privacy; on the next trip to the Yucatan another teacher was to ensure each evening that the sleeping arrangements were appropriate; and the respondent was to provide a full itinerary for the trip to Yucatan.*
66. *On 14 March 2017, the respondent provided reassurances, and instructed the school to commence an investigation and seek incident reports.*

67. *That day, the two parents advised Mrs Ruwhiu that they had been contacted by the NZ Police about concerns they had heard, as a parent of another student had contacted police.*
68. *On 15 March 2017, the Police made contact and advised that the Ministry of Education had been contacted. Mrs Ruwhiu also contacted the Ministry of Education.*
69. *A formal investigation was commenced, with letters sent to the respondent and the students involved, requesting written incident reports.*
70. *On 17 March 2017 an urgent hui was convened, and a decision made to cancel the internal trip to Yucatan.*
71. *Following advice from NZSTA and the Ministry of Education, and the NZ Police, on 18 March 2017 the board reconvened, and resolved to cancel the remaining trip and recall the students and staff to New Zealand.*
72. *A formal letter requesting a response to the allegations was sent to the respondent on 21 March 2017. That day, a meeting was held between the police, CYFS, Ministry of Education, the Board Chair Mrs Ruwhiu, and a Board member to discuss the Police investigation following the allegations, which would include the Police and CYFS conducting interviews of the students involved.*
73. *Meetings were held with staff, the parents of the students and the Police and CYFS with Mrs Ruwhiu, prior to the students returning to New Zealand. Parental consent was required to interview the students.*
74. *A mandatory report was filed, by Mrs Ruwhiu, with the Education Council on 28 March 2017, setting out seven allegations of serious misconduct by the respondent.*
75. *The students and teachers returned from the trip on 30 March 2017 and were met by Mrs Ruwhiu at Rotorua Airport.*
76. *Media were present at the airport.*
77. *The Board met on 30 March 2017 to finalise a non-disclosure agreement, pursuant to which the respondent would resign as principal.*
78. *On 31 March 2017 the respondent signed a voluntary undertaking not to teach with the Education Council.*

Police investigation

79. *In early April 2017, following their return from Mexico, interviews were conducted with 15 students by NZ Police and social workers as part of the police investigation into the allegations.*
80. *The NZ Police attempted to contact the respondent on numerous occasions.*
81. *The respondent was spoken to and chose not to interview, as is his right. The Police investigation was concluded without any charges being laid.*

Teacher's Response

82. *In addition to the above responses to the specific allegations, in submissions to the Education Council, the respondent accepted that five of the incidents occurred (allegations 1-5 as set out above) but he disputed the context or extent of the incidents, and he categorically denied one of the incidents (allegation 6) as set out above. The respondent also denied that he told S5 not to tell her parents about the incident on the train, as set out above. The respondent acknowledged that his behaviour adversely affected the students, undermines his fitness to teach and brings the profession into disrepute. He accepts that a censure and cancellation of his practising certificate are appropriate penalties for his serious misconduct.*
83. *The respondent stated that he never intended to cause harm or discomfort. He stated that he deeply regretted the impact on the students.*

Findings of fact

Particular 1(a) - sleeping in the same bed as Student 1 on multiple occasions and being naked on the majority of these occasions

12. The evidence in support of particular 1(a) is fully set out in paragraphs 11 to 26 of the Agreed Summary of Facts (ASF). In particular, on the fourth night of the trip the respondent took his pants off and got into bed naked. Again, on the second night, the respondent was naked in bed (paragraph 18). On the third night Student 1 said he would not share the bed if the respondent was naked, and the respondent put a pillow between them. When the student said he would not sleep in the bed this way the respondent put a towel around himself. These continued to be the sleeping arrangements. Student 1 described feeling the respondent's bare bottom against him on one occasion.

13. There was no doubt that the respondent was sleeping in the same bed as Student 1 on multiple occasions. It is not completely clear from the summary of facts whether the respondent was “naked” on the majority of those occasions. There is clear evidence that the respondent was completely naked on two occasions. It appears that on the other nights he had a towel around him. Some people might not describe this as being naked, but the difficulty with the respondent’s choice is that a towel can easily come loose in bed, leaving the wearer naked. Student 1 described feeling the respondent’s bare bottom touching him. It was not appropriate attire for the respondent. We find that the respondent was naked on the majority of these occasions. This particular is proven.

Particular 1(b) – sleeping in the same bed as Student 4 on at least one occasion

14. The evidence in support of particular 1(b) is in paragraphs 19 and 28 to 30 of the ASF. Although not included in the allegation, the evidence is that the respondent was naked when he shared a bed with Student 4. This particular is proven.

Particular 1(c) – in respect to Student 2:

- (i) entering the bathroom area on two occasions when it was being used by Student 2;***
- (ii) telling Student 2 to remove his underwear, and washing Student 2’s back;***
- (iii) sweeping Student 2’s hands away from covering his bottom.***

15. The evidence to support these particulars is found in paragraphs 30 to 34 of the ASF.

16. This particular is proven.

Particular 1(d) – engaging in sexualised talk to a group of students

17. There are several instances of inappropriate sexualised talk found in paragraphs 40 to 45 of the ASF. The respondent was heard to say:

- “I’d be a dirty bear in bed”.
- The boys should be careful because, “You’ll be sleeping with a bear tonight”.
- He joked about a student falling asleep on the train and having a “boner”.
- He asked whether a previous student at the school was gay.
- He told other students that Student 1 had had an erection in bed, referring to it as “morning wood”.

18. We agree that this talk may be accurately described sexualised and it was said in conversation with students. This particular is proven.

Particular 1 (e) – telling Student 5 not to tell her mother when she had been inappropriately touched on the bottom by a stranger on the metro.

19. Evidence in support of this particular is found in paragraphs 7 and 8 of the ASF. Student 5 “perceived” that the respondent was telling her not to tell her parents about the incident on the train. The respondent says that it was Student 5’s decision not to tell her parents about the incident.

20. There is insufficient evidence to satisfy us that the respondent told Student 5 not to tell her parents about the incident. It is unclear to us whether she asked the respondent for the use of her telephone, or whether he even offered her the phone. It does appear that he did not ensure her emotional well-being, but we’re not prepared to find that he told her not to tell her parents. Therefore this particular is not proven.

Particular 1(f) – being partially clothed in front of eight students

21. The evidence in support of particular 1(f) is found in paragraphs 28 to 30 and 46 to 54 of the ASF. Eight students individually described the respondent being in shorts, then “undies”, having only a towel around him, answering the phone naked, answering the door to the students in his underwear, being aware that the respondent was naked in bed.

22. The evidence in paragraphs 11 to 26 of the Summary of Facts is also relevant to this particular. When the respondent shared a bed with Student 1, he was either naked or partially clothed, again having only a towel around him.

23. This particular is therefore proven.

Particular 1(g) – emotionally abusing Student 12, telling her it was her fault that two teachers had left school.

24. According to the Summary of Facts, Student 12 felt she was being blamed for teachers leaving the school. We are told in paragraph 56 that Student 12 said that the respondent stated that it was because of her problems that two teachers had left. She said it “all started with the [suppressed] Trophy. I got upset because I got a trophy for [suppressed], not my own sport. They gave their trophies to other

people...I told the respondent and he told the other teachers they did it wrong and said that that was why the teachers left".

25. The respondent does not accept that he blamed Student 12. He said that during the conversation he did not say that Student 12 was to blame for the teachers having left, clearly stating that it was his decision to take the action that he had. Therefore, based on this statement, he does not accept that he told her it was her fault that two teachers had left school and he does not accept that he emotionally abused Student 12.
26. There is insufficient evidence before us to support the allegation that he "emotionally abused" Student 12 or that he told her it was her fault that two teachers had left school. This particular is therefore not proven.

Summary

27. In summary, we find that the respondent:
 - Slept in the same bed as Student 1 on multiple occasions and was naked on at least two of those occasions;
 - Slept in the same bed as Student 4;
 - Entered the bathroom area when it was being used by Student 2, told Student 2 to remove his underwear, and washed his back and swept Student 2's hands away from covering his bottom;
 - Engaged in sexualised talk to a group of students;
 - Was partially clothed in front of students.
28. We have found insufficient evidence to support particulars 1(e) and (g).

Serious Misconduct

29. Section 378 of the Act defines serious misconduct as follows:

serious misconduct means conduct by a teacher –

- (a) *that –*
 - (i) *adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;*
 - (ii) *reflects adversely on the teacher's fitness to be a teacher; or*
 - (iii) *may bring the teaching profession into disrepute; and*
- (b) *that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.*

30. The CAC submitted that the respondent's conduct meets all three of the limbs of s 378(1)(a). Ms Mok submitted that the respondent's conduct adversely affected the emotional well-being of the students involved, noting that the students who shared a bed with the respondent while he slept naked expressed discomfort, and felt embarrassed and humiliated in front of the other students on the trip. One of the students reported feeling "violated and angry" and "depressed" as a result of this, and that he was "very uncomfortable" with the position that he was put in. Student C also expressed feeling nervous at the time and that he felt "funny" and "super weird" about the respondent's conduct.
31. Ms Mok submitted that the use of sexualised language with students was inappropriate and potentially harmful to students' emotional well-being. In support of this the CAC noted that the making of jokes or innuendo of a sexual nature towards a learner is provided as an example of behaviour that may breach the boundaries of ethical and professional relationships in the guidance to the Code of Professional Responsibility.²
32. The CAC further submitted that the respondent's inability to understand the need for, and maintain, professional boundaries with his students on the school trip reflects adversely on his fitness to be a teacher. In support of this submission Ms Mok referred to the Code of Professional Responsibility and standards for the teaching profession, which require teachers to "maintain public trust and confidence in the profession...by demonstrating a high standard of professional behaviour and integrity" and to work in the best interests of learners by "engaging in ethical and professional relationships with learners that respect professional boundaries".
33. The CAC submitted that the respondent's lack of regard for the potential impact of his conduct on the emotional well-being of the affected students reflects adversely on his fitness to be a teacher.
34. Ms Mok also referred us to observations made in previous cases. Ms Mok produced this quote from *CAC v Huggard NZTDT 2016-33*, which we agree is pertinent:³

When a student feels uncomfortable with a teacher's interactions, it is difficult for a student to tell a teacher to leave her alone...as the adult and a teacher, the respondent had a responsibility to maintain professional boundaries...he was in a

² The Code of Professional Responsibility: Examples in Practice at page 12.

³ *CAC v Huggard NZTDT 2016-33*, 14 December 2016 at paragraphs [20]-[21].

position of power and responsibility, where he should role-model appropriate behaviour. His actions should attract esteem, not discomfort or fear.

35. And in *CAC v Luff NZTDT 2016-70* we said:⁴

As a teacher, he had a responsibility to exercise some self-discipline and restraint and maintain professional boundaries. The reasons for this are many. Students should be free from any type of exploitation, harassment or emotional entanglement with teachers. In other words, they should be free from having their learning or well-being adversely affected as contemplated in the definition of serious misconduct in section 378(1)(a)(i)...there are enough emotional and social challenges for students without a teacher adding to their confusion. Parents should be able to trust that teachers of any school are fulfilling their roles and responsibilities to teach or coach their children, and not form inappropriate relationships.

36. And in *CAC v Buchan NZTDT 2017-23*⁵ where a deputy principal sitting on the ground at a performance placed his hands on the hips of the female student who was sitting in front of him (and later hugged the student and another at the end of the performance), we noted that while there was no evidence that the teacher was making sexual advances, “*there are situations in which adults with sexual motives start with more subtle measures to test the waters and start to cross the line of a teacher/student relationship*”. We observed that “*the fact that this type of conduct can be a tactic in sexual grooming is one of the reasons it is not tolerated*”.

37. Finally, Ms Mok submitted that the respondent’s conduct is likely to bring the teaching profession into disrepute, for the same reasons as outlined above in relation to section 378(1)(a)(i) and (ii).

38. The CAC also relied on rules 9(1)(c) and 9(1)(o) of the Education Rules 2016. The criterion in r 9(1)(c) is:⁶

The psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted

⁴ *CAC v Luff NZTDT 2016-70*, 20 July 2016 at [11].

⁵ *CAC v Buchan NZTDT 2017-23*, 8 February 2018

⁶ The Education Council Rules 2016 were amended by the Education Council Amendment Rules 2018, and their name changed to the Teaching Council Rules by s 12 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018. Because this conduct occurred before 19 May 2018, the pre-amendment rules apply (see Schedule 1 of the Teaching Council Rules 2016).

in front of a child or young person, threats of physical or sexual abuse, and harassment.

39. And r 9(1)(o) covers:

Any act or omission that brings, or is likely to bring, discredit to the profession.

40. The CAC submitted that the respondent's conduct in failing to maintain appropriate professional standards, lack of judgement and lack of regard for student well-being through his actions brings discredit to the profession referring to the test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74, Ms Mok submitted that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour. She further submitted that it was evident that one of the students suffered psychological harm as a result of the respondent's actions, and made to feel violated, angry and depressed.

41. Ms Mok also referred us to cases where a respondent's failure to maintain professional boundaries (in the absence of a physical relationship) where findings of serious misconduct were made.⁷

42. For the respondent, Ms Andrews accepted the CAC's submissions.

Discussion

43. The Tribunal has no hesitation in finding that each of the proven particulars individually amounts to serious misconduct.

44. We are satisfied that the respondent's conduct adversely affected or was likely to adversely affect the well-being or learning of one or more students as contemplated by s 378(a)(i) as discussed below.

45. According to paragraph 16 of the Agreed Summary of Facts: "*the other students in the room teased S1 about sleeping in the bed with the respondent while he was naked. S1 said he felt depressed for the first time in his life and took himself off to be by himself.*"

46. The respondent's conduct adversely affected Student 4's wellbeing. Student 1 described Student 4 as being "shaken up" after the respondent had slept naked next to him and had got out of bed and walked to the phone naked. Student 4 said that he felt "down" about this.

⁷ *CAC v Luff NZTDT 2016-70, 20 July 2016]; CAC v Huggard NZTDT 2016-33, 14 December 2016; CAC v Buchan NZTDT 2017-23, 8 February 2018*

47. Student 2, who was scrubbed in the shower, said that he felt “funny weird” when asked to take his underwear off. He closed his eyes and waited for the respondent to finish scrubbing his back.
48. Girls reported feeling uncomfortable at the respondent’s sexual humour outlined in particular 1 (d). Irrespective of whether any students reported any embarrassment or offence at the respondent’s crude and puerile jokes, we find that his conduct was likely to adversely affect the well-being or learning of one or more students. When teachers are present, students should be free from exposure to such crassness and immaturity. Where the teacher is the perpetrator, and the students are so far from home, we would expect some students to feel upset and unsafe. We consider this behaviour would be very likely to affect the well-being of at least one student.
49. Similarly, although we are not told of any actual harm caused by the respondent’s state of semi-undress as outlined in relation to particular 1(f), we consider it was likely to adversely affect the well-being or learning of one or more students. S5 stated: “When we knocked on the door, [the respondent] would answer the door in his undies. I didn’t know where to look.” In our society it is not common for adults to walk around naked in front of a group of teenagers. Most young people do not want to see their own parents naked, let alone any other adult. We think it is likely to have affected the well-being of at least one student.
50. We also find that the respondent’s conduct was likely to adversely affect the learning of at least one student. We think it likely that the emotional impact of his behaviour would have interfered with the learning for some students. We also expect that his conduct would have detracted from his credibility and dignity, therefore minimising the weight of his influence for some students.
51. Before determining whether the respondent’s conduct also sits under s 378(a)(ii) and (iii), and while still on the topic of potential harm, we turn to whether it amounts to psychological abuse under r 9(1)(c), which :

The psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment.
52. The respondent’s explanation for sleeping naked was that he has difficulty sleeping with any clothes on. The respondent says that his motives were not “nefarious.”

53. Regardless of the respondent's lack of pyjamas, we consider the decision to share a bed with a student was not appropriate. We would expect most students would prefer not to be singled out by having to share a bed with a teacher. If sharing is absolutely necessary, then the teacher has a responsibility to dress appropriately, both in order to minimise the student's possible embarrassment or discomfort, and also to ensure there is no misunderstanding of the teacher's conduct or motives. The same is true of the respondent's decision to be naked in front of the students. It is a matter of common sense. And even when the student said he did not want to share with the respondent naked, the respondent simply wrapped a towel around himself.
54. The respondent's decision to enter the bathroom area when it was being used by Student 2, was concerning. This was a clear invasion of Student 2's privacy and personal space. Telling the student to remove his underwear is even more difficult to comprehend, surpassed only by the respondent's actions in washing Student 2's back and sweeping the student's hands away from covering his bottom.
55. According to the summary of facts, the respondent's reason for his actions was because he believed Student 4 had a tick. There is no other evidence that the boy had a tick. Although not medical experts, we have not heard of scrubbing as a means of removing ticks, which we understood was usually done with a pair of tweezers. If scrubbing is an appropriate treatment (or he genuinely believed it was), then we see no reason for anyone else to assist Student 4, who at the age of 15 should have been perfectly capable of attending to this. If the respondent did not know how to remove a tick, then he should have sought medical treatment.
56. Twice the respondent had the student remove his underpants. We cannot find any justification for this. We are appalled by the respondent's actions. We do not imagine that the respondent would have done the same to one of his colleagues or that they would have acquiesced to his requests. This was a clear abuse of his position of authority and power over Student 2, who as a student, is expected to obey instructions from a teacher, and in this case, his principal.
57. That said, we are not sure this conduct amounts to psychological abuse as set out in r 9(1)(c). It may include (but is not limited to):
 - Physical abuse of another person
 - Damage to property, inflicted in front of a child or young person
 - Threats of physical or sexual abuse
 - Harassment.

58. There is arguably an element of physical abuse in scrubbing Student 2, but in dealing with this matter on the papers, we have not had an opportunity to explore these matters further with the witnesses, the respondent, counsel for the CAC or the respondent's representative, we do not think that is a fair conclusion to reach. The student was placed in the impossible position of allowing his principal to scrub his back, an act that in itself would not ordinarily be a form of physical abuse or inappropriate use of force.
59. There is no other act of physical abuse of any other student, and there is no damage to property or threat of physical or sexual abuse.
60. Harassment is not defined in the Rules. A dictionary definition of "harass"⁸ is:
 1. *To disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute.*
 2. *To trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid.*
61. This requirement of more than one incident is reflected in the Harassment Act 1997.
62. We find that the respondent repeatedly had little regard for the impact of his actions on the emotional and psychological welfare of the students, but we are not satisfied that his actions amount to harassment in the usual meaning of that word.
63. The fact that we have not found the respondent's conduct amounts to psychological abuse, does not alleviate our view of its seriousness in any way. We think his behaviour as outlined in the evidence in support particulars a) and f) is despicable. Some regulatory regimes provide for grades of professional misconduct, including "disgraceful conduct" for the most serious. "Disgraceful" aptly describes the respondent's behaviour towards all the students on this trip.
64. It follows that we consider his conduct brings discredit to the teaching profession as set out in r 9(1)(c). In our view the test in *Collie v Nursing Council of New Zealand*⁹ is met. We are satisfied that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner. For the same reasons, it brings the teaching profession into disrepute under s 378(c).

⁸ <https://www.dictionary.com/browse/harass>

⁹ [2001] NZAR 74 at [28]

65. We also find that the respondent's conduct reflects adversely on the respondent's fitness to be a teacher (s 378(b)). As a principal responsible for leading this trip, it shows poor judgement to make sleeping arrangements which involved him sharing a bed with a student. Student 1's request to swap with another student was refused. He had to tell the respondent that he would not share with him if the respondent was naked. A student should not need to say this to a teacher. But even worse this was after the respondent had said at breakfast that Student 1 had *put his leg over the top of the respondent's genitals (in his sleep) and that he had an erection at the time*.

66. The respondent's treatment of Students 1 and 4, his prurient humour as outlined above, and his disregard for the feelings of all of the students, all reflect adversely on his fitness to be a teacher.

Penalty

CAC position

67. The CAC submitted that the purposes of professional disciplinary proceedings are to ensure public protection and the maintenance of proper professional standards through general and/or specific deterrence.¹⁰ Each purpose must be addressed in its own right; it may be that a particular case does not give rise to significant protection concerns but that maintenance of proper professional standards requires that certain orders, including potentially deregistration, be made nevertheless.

68. Ms Mok submitted that cancellation of the respondent's practising certificate is necessary in this case to ensure public protection, deterrence and the maintenance of professional standards, and that a lesser penalty than cancellation will be insufficient to meet the purposes of professional disciplinary proceedings, having regard to the following aggravating features of the respondent's conduct:

- a. The respondent's conduct was not isolated to one incident, but rather involved multiple instances of highly inappropriate conduct, which affected the wellbeing of a number of students.
- b. The respondent's course of conduct showed a persistent lack of judgement and awareness of the implications of his actions, and the impact of his actions on the wellbeing of the relevant students. Some of the conduct (including sleeping naked in bed with his students, and washing one of the student's backs) continued despite the students'

¹⁰ *Z v CAC [2009] 1 NZLR 1 (SC).*

verbal communication of their discomfort to the respondent. The respondent's conduct in sleeping in the same bed as his students only ceased when a student told his parents about the respondent's conduct (who then went to the Board of Trustees of the kura).

- c. The conduct occurred while the students were overseas away from home and had limited contact with their parents, and were therefore vulnerable and reliant on the respondent to provide a safe and supportive environment.
- d. The respondent, as the Principal of the kura, was in a heightened position of responsibility, and should have been a role model for appropriate behaviour. Despite this, he failed to ensure appropriate measures were in place for accommodation during the trip.

69. Ms Mok submitted that the respondent's conduct was more serious than in *CAC v Buchan*, where the teacher's conduct engaging in inappropriate interactions with two students on one occasion, whereas in the present case, the respondent's course of conduct was not an isolated one-off occurrence. In contrast to *Huggard*, the respondent's conduct in the present case persisted despite some of the students expressing their discomfort to the respondent about his actions.

70. Ms Mok submitted that the respondent's conduct gives rise to real concerns about his fitness to practise, such that cancellation of the respondent's practising certificate is the only appropriate outcome in the circumstances. She further submitted that censure of the respondent is also warranted for the purposes of promoting accountability and deterrence.

71. Ms Mok appropriately noted that the respondent has accepted the charges, and has no previous disciplinary history.

Respondent's submissions

72. Ms Andrews accepted the CAC's submission that cancellation was the appropriate penalty. She also submitted that the respondent's conduct should be viewed in light of his sleep deprivation, a factor that was acknowledged by this Tribunal in *CAC v Pemberton NZTDT 2015-62*¹¹ as affecting that teacher's ability to respond appropriately when he observed some unacceptable student behaviour and grabbed

¹¹ *CAC v Pemberton NZTDT 2015-62*, 16 August 2016

the student by the scruff of the neck and marched him to the back of the hall. Ms Andrews submitted:

In this case “the respondent lost sight of his responsibility to ensure the emotional safety of his students, in addition to ensuring they were physically safe. He also lost sight of his responsibilities as a role model. He lost sight of his lodestar.

73. Unlike *Pemberton*, there is no “knee-jerk” reaction in the present case, and we have no medical evidence of sleep apnoea. We also note that the respondent accepts that cancellation is the appropriate penalty.

Decision

74. We view the respondent’s conduct very seriously. The evidence in support of particulars 1 a), b) and f) relate to his lack of clothing. While we appreciate that the respondent might find it difficult to sleep without pyjamas, he knew that before he went away with the students. He needed to take appropriate steps to put the needs of his students before his own. That might have included ensuring he had a bed to himself, ensuring that he was appropriately clothed when he got out of bed, or using other sleeping aids such as sleeping pills. We consider his persistence with his behaviour in the knowledge that students were not happy is an aggravating feature of his conduct. At best his actions were selfish; at worst lascivious.

75. We have already described the respondent’s behaviour as despicable. Cancellation is the only appropriate penalty. We agree that he should also be censured. We make those orders under s 404(1)(g) and (b) respectively.

Name Suppression

76. The respondent applied for name suppression. The grounds are that publication of his name would adversely affect:

- The kura, which he was involved in establishing and with which his name is associated;
- Students’ opportunities as they moved into employment and tertiary study. This is because the students who went to Mexico had extensive social networks and the good name of the kura was an advantage to them;

- c. The respondent also referred to the circumstances of two students in particular, one who has embarked on a career, and one whose family life had been unsettled;
- d. Members of his family. The respondent set out their involvement in education and the media.

77. In a letter dated 25 o Pipiri (June), the kura applied for name suppression of:

- a. All students who attended the Mexico trip, and in particular the names of three students they deem highly vulnerable and the impact it would have on their future pathways. In particular they referred to the students' *taha hinengaro* and *taha wairua* (psychological and spiritual wellbeing);
- b. The kura, on the basis that it is well-known and highly respected amongst its peers for its academic, cultural and sporting profile and reputation. Publication would impact adversely right across the entire school and its community, in particular those students directly affected.

78. The CAC's position was that there was no evidence to support the submission that publication of the name of the kura or the respondent raised a risk of identifying the students and causing them hardship. There has already been some publicity about the return of the kura trip and the respondent's resignation.

79. The CAC did not oppose any suppression orders to the extent that they are necessary to protect the affected students from being identified, but submitted that given the previous publicity and the absence of any evidence of even a risk that the students would be identified by the publication of the kura's name or the respondent's name, the test for non-publication had not been met.

80. The Tribunal asked the CAC to make enquiries of the students and whānau affected by the respondent's conduct and ascertain their attitude to name suppression for the respondent and the kura. The responses varied.

Name suppression for the respondent

81. There were 6 submissions that (interim) name suppression should be lifted. The reasons included:

- a. Making the respondent accountable for his actions;
- b. Protection of others, noting that publication of name protects others from employing him in a position where he will work with vulnerable young people,

and that others should not be “placed in that space of danger or unwanted advances without knowing a suspected Tangata Kīno (perpetrator).”

- c. At least two students wanted it known that they suffered more after their return by keeping their silence, and they lived in fear for some time afterwards. It was felt that their bravery, their truth could be the exemplar for taiohi (other young people) in the future. Similarly, another student was said to have support around him and to be strong in himself to deal with anything that comes his way.
- d. Two people felt that there had been no acknowledgement of wrong doing or apology to the tamariki that what he did was wrong.

82. There were 5 letters in support of name suppression. It was felt that students, parents and the wider family have suffered enough and that students' education should be without any more interruptions. There was concern for the impact on tamariki involved in the trip, their teachers and their kura, in particular for those who have moved forward and have found closure regarding this matter.

83. It was also felt that because there had been a police investigation, and the case closed, name suppression should not be lifted.

84. Unfortunately it was also not clear from the information provided whether the submitters were aware of the actual matters that the respondent has admitted to, and we were not told specifically what the attitude was of the students referred to in the charge, and particularly, that of Students 1, 2 and 4.

85. We also received a further response from the respondent, who said that he unreservedly apologises for his actions, and said he had been advised that contact with “those that had laid the allegations” was unwise.

86. Some people wanted both name suppression for the respondent and the kura. One felt that the respondent's name should be published but not the kura's, to allow the school to protect its reputation and allow good work to continue without any backward steps. Another said that the kura's name should not be suppressed to make it absolutely clear that it was the respondent, and to allow opportunity for students to come forward who did not previously due to fear of reprisal and whakamā (shame) and to show the school is resilient and has since moved on with business.

87. In some whanau submissions, criticisms were levelled at the Board, mainly at the manner in which the matter was handled.

Discussion

88. Section 405(3) of Act provides that all hearings are in public, but this is subject to subsections (4) to (6). Under s 405(6) the Tribunal may make orders for non-publication of various matters if the Tribunal is:

...of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest..”

89. The principles on publication of name have been outlined in several decisions.¹² In particular:

- a. There is a presumption in favour of open justice;
- b. In exercising our discretion, we must have regard to the interest of any person and to the public interest;
- c. We must consider whether it is “proper” to make any orders for non-publication;
- d. If we decide it is proper, we may then make an order.

Students

90. We need to state at the outset that the names of the students were not disclosed in the evidence that was originally before the Tribunal. There are some names in some of the letters that were provided in response to the Tribunal’s request for advice on how the students and whānau felt about name suppression. We do not know which facts relate to which students.

91. It is usual for this Tribunal to make orders for non-publication of students’ names. Rule 34 of the Rules provides for special protection for certain witnesses and vulnerable people:

34 Special protection for certain witnesses and vulnerable people

- (1) *This rule applies to a person—*
 - (a) *who is a child or young person; or*
 - (b) *who is a person on whom, or in respect of whom, sexual acts are alleged to have been performed; or*

¹² See for example, CAC v Finch NZTDT 2016-11, CAC v McMillan NZTDT 2016-52, 23 January 2017; CAC v Teacher S 2016-69, 14 June 2017

- (c) *who is alleged to have been compelled or induced to perform sexual acts; or*
- (d) *whose evidence before the Disciplinary Tribunal, in the Tribunal's opinion, relates to some other matter that may require the person to give intimate or distressing evidence.*

...

- (4) *If evidence before the Disciplinary Tribunal includes details relating to a person described in subclause (1), the Tribunal must consider whether it is proper to make an order, in accordance with section 405(6) of the Act, prohibiting publication of the name or particulars of the affairs of the person.*

92. The students are covered by r 34(1)(a), and further, we consider that the evidence of Students 1, 2 and 4 would cause them significant embarrassment. Although it might not be of an “intimate” nature, we find it would likely be distressing. Rule 34(1)(d) therefore applies. Therefore, we *must* consider if it is proper to make an order under s 405(6).
93. We are satisfied that the students’ interests in continuing their education and careers unimpeded easily outweighs any public interest in having their names published in association with those facts. They should not be further harmed. However, the kura has asked us to suppress the names of all the students that went on the trip. Although their names are not known to us, the names of students who went on the trip are already known to their community. We therefore do not think is proper to make that order. We can protect the interests of students with other orders.
94. Under s 405(6) we make orders for non-publication of the names of the students referred to in the letters that were submitted in response to our request for further information (referred to above at paragraph 88). This order for non-publication refers only to their association with those letters. In other words, the fact that they went on the trip is not suppressed. Their names however are not to be associated with the submissions that were made in the letters.
95. In summary, the names of the students who went on the trip to Mexico are not suppressed. The actual names of the students who are referred to in the Notice of Charge and Summary of Facts as Students (or S) 1, 2, 3, 4, 5, 7, 10, 11, 12, 13 are not to be published in connection with any specific allegation or fact contained in the charge, the Summary of Facts or this decision.*

*See Addendum dated 17 June 2019.

The kura

96. The kura sought name suppression on the basis that publication would have an adverse impact on the school, its community and the students directly affected.
97. We have dealt with the matter of the students affected in our orders above.
98. We accept that publication may have some negative impact on the kura and its community. However, we note the following:
 - a. From the media extracts provided, the public is already aware that a trip to Mexico was curtailed and that the respondent has resigned;
 - b. By 23 February 2017 the Chair of the Board was aware of the incident involving the shower, but the trip continued, and the respondent remained;
 - c. A travel safety policy was then drafted, including no sharing of beds with staff;
 - d. The Chair relied on advice from the respondent that no further staff member was needed;
 - e. By 14 March, the Chair knew that a parent had complained to the Police, and the trip was finally cancelled on 18 March.
99. We do not know what travel safety policy was in place before the trip was made. On the one hand, a Board should be able to rely on a Principal to make sensible, safe decisions which do not place the students or the kura's reputation at risk; on the other hand we do query whether the Board had assessed all risks involved with the trip and satisfied itself as to the risk management measures.
100. The kura has referred to the need to care for students' taha hinengaro and taha wairua (psychological and spiritual wellbeing). We are concerned about the measures that were in place to protect this as well as their taha tinana and taha whānau (physical and social wellbeing) before the trip began and again, between 23 February and 18 March, when they were aware of allegations being made against the respondent. We appreciate that the desire to take into account the wishes of two students that the trip should not be curtailed, but the responsibility for student welfare and the kura's reputation does not rest solely on the wishes of two students.
101. We trust that all concerned have learned from these experiences, but we are not satisfied that the public interest is outweighed by the school's interests in this case. We do not think it is proper to order non-publication of the school's name.

102. We accept that the media has been interested in this case and may continue to do so. How any media coverage affects the students will be influenced by the fortitude and maturity of the kura and its community in supporting them. We are very mindful that incidents such as what happened on this trip are often not properly aired, an experience that has been articulated by some whānau.

Respondent

103. Although we have some sympathy for any embarrassment that the respondent's family members may suffer as a result of his actions, we see that as a natural consequence of his actions. It is not uncommon for teachers who come before us to have other family members who are involved in education either as registered teachers or in education more generally. The interests of the respondent's family do not outweigh the public interest in this case.

104. We have not granted the kura name suppression, and so the argument that the respondent needs name suppression to protect the school is not relevant.

105. We have discussed the students' interests above at paragraphs 93 to 95 and 99 to 102.

Costs

106. The CAC seek costs of 40% pursuant to s 404(1)(h) of the Act, given the matter proceeded as a hearing on the papers.

107. We order the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs.

108. The Tribunal's costs were estimated as \$1,145, 40% being \$458. We therefore order the respondent to pay \$458 under s 404(1)(i),

109. The Tribunal delegates to the Chairperson authority to determine the quantum of the CAC costs and issues the following directions:

- Within 10 working days of the date of this decision the CAC is to file and serve on the respondent a schedule of its costs
- Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the CAC.

- c) The Chairperson will then determine the total costs to be paid.

A handwritten signature in blue ink, appearing to read "Theo Baker".

Theo Baker

Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**NZTDT 2018-9A****IN THE MATTER** of the Education Act 1989**AND****IN THE MATTER** of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE****AND****UENUKU LINCOLN FAIRHALL**
Respondent

**ADDENDUM DATED 17 JUNE 2019 TO DECISION
DATED 12 NOVEMBER 2018**

1. Paragraph 95 of the Tribunal's decision dated 12 November 2018 is amended to include the words "concerning the respondent's conduct" after the words "in connection with any specific allegation or fact". This is purely to clarify, not alter the intent of the order.
2. Paragraph 95 now reads:

In summary, the names of the students who went on the trip to Mexico are not suppressed. The actual names of the students who are referred to in the Notice of Charge and Summary of Facts as Students (or S) 1, 2, 3, 4, 5, 7, 10, 11, 12, 13 are not to be published in connection with any specific allegation or fact concerning the respondent's conduct contained in the charge, the Summary of Facts or this decision.



Theo Baker

Chair